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In The Supreme Court of The United States

OCTOBER TERM, 1965

HOLLYWOOD BASEBALL ASSOCIATION,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PAGE

SUBJECT INDEX

	Page
Citations to opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	6
Reasons for granting the writ	10
Conclusion	15
Appendix A - Decision and opinion of Tax Court	17
Appendix B - Decision and opinion of District Court of Appeals, Ninth Circuit	34

CITATIONS

Page

Cases

Albright v. United States,
173 F. 2d 339 12

Commissioner v. Bilder,
369 U.S. 499 15

Corn Products Co. v. Commissioner,
350 U.S. 46 . . . . . 3, 9, 10, 14

Gotfredson v. United States,
303 F. 2d 464 10

Hertz Corporation v. United States,
364 U.S. 122 13

Hillard v. Commissioner,
281 F. 2d 279 . . . . . 10, 12, 14

Malat v. Riddle, 347 F. 2d 23 . . . . . 11, 15

Massey Motors, Inc. v. United States,
364 U.S. 92 13

Municipal Bond Corporation v. Commissioner, 41 T.C. 20,
rev'd, 341 F. 2d 683 . . . . . 8, 9, 10
11, 14

Philber Equipment Corp. v. Commissioner, 237 F. 2d 129 13

Rollingwood v. Commissioner,
190 F. 2d 263 . . . . . 8, 9, 11, 14

CITATIONS (Continued)

	Page
Cases	
S. E. C. Corp. v. United States, 140 F. Supp. 717, aff'd per cur., 241 F. 2d 416	10, 11
Shapiro v. United States, 335 U.S. 1	15
The Colony Inc. v. Commissioner, 357 U.S. 28	15
United States v. Bennett, 186 F. 2d 407	12
Statutes	
Internal Revenue Code of 1954	
Sec. 337 (26 U.S.C. 1958 ed., Sec. 337)	3, 4, 7, 11, 12
Sec. 1221 (26 U.S.C. 1958 ed., Sec. 1221)	4, 5, 7, 10, 11, 15
Sec. 1231 (26 U.S.C. 1958 ed., Sec. 1231)	5, 6
Sec. 6213(a) (26 U.S.C. 1958 ed., Sec. 6213(a))	6
United States Code, Title 28, Sec. 1254(1)	2

CITATIONS (Continued)

Page

Miscellaneous

Bouvier's Law Dictionary 11

Webster's New International Dictionary 11

IN THE SUPREME COURT

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vs.

COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOLLYWOOD BASEBALL ASSOCIATION prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on November 1, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Tax Court, applicable portions, printed in Appendix A hereto, infra, pp. , is reported in 42 T.C. 234. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, pp. , is reported in 352 F. 2d 350.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1965 (I-R. 157). 1/ The jurisdiction of this court is based on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The taxpayer corporation operated a professional baseball team in Los Angeles, California, as a member of the Pacific Coast League. During the period of its existence, in developing a first class team, it had acquired player contracts, trained and developed players, and had sold, released and otherwise disposed of player contracts when required under the conditions existing in the business of professional baseball. The questions presented are:

1/ The record in this case consists of three volumes designated as Volume I, II and II A. "I-R." references are to Volume I. Reference to the other volumes will be cited as "II-R." and "II-A-R", respectively.

1. Whether the proceeds from the sale of a portion of the taxpayer's baseball team during the course of its liquidation is within the purview of the nonrecognition provisions of Section 337 of the Internal Revenue Code. (26 U.S.C. § 337)

2. Whether the word "primarily" in the phrase "held by the corporation primarily for sale" as used in Section 337(b)(1)(A) is to be construed in its well recognized and understood meaning "of first importance or principally", or in the manner construed by the court below as meaning "essential" or "substantial", in determining the applicability of the nonrecognition provisions of Section 337 to the gain realized from the sales of a portion of the taxpayer's baseball team during the course of liquidation.

3. Whether the decision of this court in Corn Products Co. v. Commissioner, 350 U.S. 46, is to be expanded to deny the benefits of Section 337 of the Internal Revenue Code (26 U.S.C. § 337) on the gain from sale of a portion of taxpayer's baseball team during the course of its liquidation.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1954:

SEC. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) General Rule. -If-

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

(b) Property Defined. -

(1) In general. - For purposes of subsection (a), the term "property" does not include -

(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business.

* * * * *

(26 U.S.C. 337)

SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include --

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * *

(26 U.S.C. 1221)

SEC. 1231. PROPERTY USED IN THE TRADE OR BUSINESS AND INVOLUNTARY CONVERSIONS.

* * * * *

(b) Definition of Property Used in the Trade Business. -- For purposes of this section--

(1) General Rule. --The Term "property used in trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not--

(A) property of a kind which would properly

be includible in the inventory of the taxpayer if on hand at the close of the taxable year.

(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or

* * * * *

(26 U.S.C. 1231)

STATEMENT

This is a Federal income tax case and the Tax Court's jurisdiction was based upon Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 6213 (a)).

Petitioner, HOLLYWOOD BASEBALL ASSOCIATION, was a corporation organized under the laws of the State of California, and operated a professional baseball team in Los Angeles, California, as a member of the Pacific Coast League (I-R. 58-60). During October of 1957, the National League, at the request of the Dodgers and Giants baseball clubs, served notice of its intention to acquire the territories of Los Angeles and San Francisco as National League territory, thus excluding the taxpayer from further playing of professional baseball in Los Angeles, California (I-R. 87-88). As a result of this action, the taxpayer decided to dissolve, and on December 17, 1957, taxpayer's stockholders adopted and assented to a plan of complete liquidation (I-R. 61). Within the twelve-month period,

beginning on the date of the adoption of such plan, all of the assets of the corporation were distributed in complete liquidation.

The taxpayer reported the gain from the sale of its team as consummated during the twelve-month period following the adoption of the plan of complete liquidation and as nontaxable income under the provisions of Section 337 of the Internal Revenue Code of 1954 (I-R. 61 and 100). The Commissioner of Internal Revenue contested the applicability of the non-recognition provision of Section 337 to the gain on the sale of eight of the player contracts and contended that player contracts were held primarily for sale to customers in the ordinary course of the taxpayer's business and were therefore excluded from the nonrecognition provisions of Section 337 by Section 337(b)(1)(a) (I-R. 105-106). The taxpayer's treatment of the sale of the remainder of the team, twenty-eight players (II-R. 126), was conceded by the Commissioner in his Tax Court Brief.

In its opinion the Tax Court stated: "This exclusion of 'inventory type'assets has its counterpart in Section 1221(1). . ." (I-R. 107). The Tax Court then stated: "The ultimate question is whether one of the primary purposes for which petitioner held the relevant property was for sale to customers in the ordinary course of business . . . " (I-R. 110).

The Tax Court specifically refused to find the "principal" or "chief" purpose and continued:

> "Petitioner views our task differently and avers that we must find the major purpose for which the baseball contracts were held.

> It asks us to determine whether the purpose was to hold baseball player contracts for amusement income or for sale. But we need not choose between purposes since the statute denies nonrecognition to property 'primarily' held for sale and it is well established that 'primarily' does not necessarily mean 'principal' or 'chief'. The requisite purpose is present if there is an essential or substantial holding for sale. Property may be held for more than one purpose and if one of the dual purposes is sale to customers in the ordinary course of business, the gain thereby derived may fail to qualify for nonrecognition relief." (Citations) (I-R. 110)

The Tax Court relied on the meaning of the term "primarily" announced by the court below in Rollingwood Corporation v. Commissioner, 190 F. 2d 263 (C.A. 9, 1951). In the Rollingwood case, the court below had defined the term "primarily" to mean "essential" or "substantial", 190 F. 2d at p. 266 and the Tax Court on that basis applied the term "primarily" as meaning that there could be a "dual purpose" (I-R. 110).

The Tax Court, in defining the term "primarily" as the equivalent of "essential" or "substantial", further relied on Municipal Bond Corporation, 41 T.C. 20, which was reversed by the Eighth Circuit in Municipal Bond Corporation v. Commissioner, 341 F. 2d 683 (C.A. 8, 1965). In its opinion reversing the Tax Court, the Eighth Circuit expressly rejected the Rollingwood definition of the word "primarily". (341 F. 2d 683, 687)

The Tax Court, having found the player contracts in

question "held primarily for sale" under the Rollingwood doctrine, attempted to buttress its decision by referring to this court's decision in Corn Products Co. v. Commissioner, 350 U.S. 46 (1950). In the Corn Products case, where the purchase and sale of corn futures was "tied in" with the taxpayer's inventory, this court found that the purchases were a part of its corn-buying program and an integral part of its business designed to protect its manufacturing operation against a price increase in its principal raw material and to insure a ready supply for future manufacturing requirements. The transactions were held to be a form of insurance against increases in the price of corn and taxable as ordinary income rather than capital gains.

That the Tax Court was relying on the Rollingwood definition of the term "primarily" and its finding of "inventory type" assets in citing the Corn Products case, is clear from the Tax Court's statement: "Indeed, the instant case is clearer than Corn Products Co., since we have here found that the relevant property was primarily held for sale to customers in the ordinary course of business within the terms of Section 337 (b)(1)(A)." (I-R. 120)

The Tax Court had also attempted to use Corn Product Co. to buttress its opinion in Municipal Bond Corporation, 41 T.C. 20, by stating at pages 29-30: "There is no question that petitioner's gain from the sale of real estate were profits arising from the everyday operation of a business as distinguished from casual or incidental sale which Congress intended to tax as ordinary income. Corn Products Co. v. Commissioner, supra." As previously stated, the Tax Court's decision was reversed by the Eighth Circuit in Municipal Bond Corporation v.

Commissioner, 341 F. 2d 683 (C.A. 8, 1965).

The Fifth Circuit, in Hillard v. Commissioner, 281 F. 2d 279 (C.A. 5, 1960), also did not find the Corn Products doctrine applicable in a similar type of case, even though the dissenting opinion was based on an expanded application of that doctrine. The application by the Court below, of the Corn Products case was plainly based on the finding that the property in question was held primarily for sale, and is in conflict with the Eighth Circuit in Municipal Bond Corporation v. Commissioner, 341 F. 2d 683 (C.A. 8, 1965), and the Fifth Circuit in Hillard v. Commissioner, 281 F. 2d 279 (C.A. 5, 1960).

The court below, in its decision in the instant case, Commissioner of Internal Revenue v. Hollywood Baseball Association, 352 F. 2d 350 (C.A. 9, 1965), adopted the opinion of the Tax Court on this issue and referred to 42 T.C. at 256-63, inclusive, and Tr. pp. 105-20, inclusive, as its decision on the issues in question.

REASONS FOR GRANTING THE WRIT

1. A direct conflict of circuits exists on the meaning of the phrase "held primarily for sale" as used in Internal Revenue Code of 1954 (26 U.S.C.) § 1221(1). In that conflict, directed particularly to the word "primary", the court below, and the Second Circuit (S.E.C. Corp. v. United States, 140 F. Supp. 717, 719, affirmed per curiam, 241 F. 2d 416 (C.A. 2)) range on one side and the Eighth Circuit (Municipal Bond Corporation v. Commissioner, 341 F. 2d 683 (C.A. 8, 1965), and the Sixth Circuit (Gotfredson v. United States, 303 F. 2d 464, 468 (C.A. 6, 1962)) on the other.

The court below sustained the Tax Court in holding: "Judicially developed concepts and interpretations regarding Section 1221(1) are clearly applicable in an analysis of Section 337(b)(1)(A)" (I-R. 108), and in proceeding to interpret the term "primary" as "substantial" or "essential" rather than "principal" or "chief" relying on, inter alia, Rollingwood Corporation v. Commissioner, 190 F. 2d 263 (C.A. 9, 1951).

According to Rollingwood, what the term "primary" in Internal Revenue Code of 1954 (26 U.S.C.) § 1221(1) means (taking in lieu of the adverb "primarily", the adjective "primary") is not "principal" or "chief", but "essential" or "substantial". The Second Circuit, S.E.C. Corp. v. United States, supra, agreed. The Eighth Circuit, however, on February 18, 1965, in Municipal Bond Corporation v. Commissioner, supra, at page 687, expressly and necessarily rejected that view, holding the term to mean instead, "of first importance or principally" and cited many federal and state cases as well as Webster's New International Dictionary and Bouvier's Law Dictionary, supporting that definition. Shortly thereafter, on May 27, 1965, the Ninth Circuit rendered its decision in William Malat and Ethel Malat v. Robert A. Riddell, District Director of Internal Revenue, 347 F. 2d 23 (C.A. 9, 1965), recognizing the Municipal Bond Corporation case, but following Rollingwood. This honorable court then granted a writ of certiorari in Malat v. Riddle, supra, on November 8, 1965. (382 U.S. 900) No. 487

2. In the instant case, the Ninth Circuit has carried the conflict in the interpretation of Internal Revenue Code of 1954 (26 U.S.C.) § 1221(1) into the interpretation

of Internal Revenue Code of 1954 (26 U.S.C.) § 337 creating further confusion in the application of the tax laws.

3. A further, direct conflict in Circuits exists with Ninth Circuit on one side and the Third Circuit, Fifth Circuit and Eight Circuit on the other. The instant case involves the sale during the course of liquidation of eight of the taxpayer's baseball player contracts. The taxpayer in the course of developing a first class minor league team had in prior years acquired player contracts, trained and developed players, and sold, released and otherwise disposed of player contracts. The factual situation involved in building and maintaining a baseball team is analogous to the situations involved in building and maintaining breeding and dairy herds or a fleet of rental equipment, particularly when the court below found: "Successive agreement to contracts containing reserve clauses would effect control over a player during his playing life." (I-R. 67). In fact, the reasoning of Judge Woodrough in his dissenting opinion in Albright v. United States, 173 F. 2d 339, 345 (C.A. 8, 1949) is very similar to that of the Tax Court approved by the Ninth Circuit in the instant case. The majority opinion of the Eighth Circuit, in Albright v. United States, supra, however, held that the dairy herd was not held primarily for sale in the ordinary course of business and that the sales made are incidental to the business and required for its economical and successful management. The Fifth Circuit, in United States v. Bennett, 186 F. 2d 407 (C.A. 5, 1951), involving a breeding herd, refused to interpret "primarily" as "ultimately" -- "that is, after their primary use and purpose is finished and over". The Fifth Circuit, in Hillard v. Commissioner, 281 F. 2d 279 (C.A. 5, 1960), involving sales of trucks

and automobiles after a rental period, held that such sales were only an incident of leasing and not the business itself. The Court there further pointed out that the profit on the sales was the result of deduction of costs in prior years through excessive depreciation allowed by the Commissioner and cited this court's opinion in Massey Motors, Inc. v. United States, 364 U.S. 92 (1960) and Hertz Corporation v. United States, 364 U.S. 122 (1960), where capital gains were allowed, but depreciation was adjusted.

The Third Circuit, in Philber Equipment Corp. v. Commissioner, 237 F. 2d 129 (C.A. 3, 1956) involving facts similar to Hillard v. Commissioner, supra, is particularly analogous to the case at hand. In the instant case, we have a team represented by one year renewable baseball player contracts and the Tax Court held that the taxpayer had as one of its primary purposes, the ultimate sale to customers at the time the players were acquired (I-R. 116). In Philber Equipment Corporation, supra, the rental of automobiles and trucks were principally leased on one year leases, and the Third Circuit, at 237 F. 2d p. 130, found that the taxpayer knew when the equipment was acquired that it would probably be sold at the expiration of the lease due to business conditions. The Court there held that the sales were an unavoidable consequence of conditions existing in the business and the sales factor was not a dominating purpose. The case at hand is clearly in direct conflict where it is not questioned that the taxpayer sold its player contracts only when required under the conditions existing in the business of professional baseball and the court below found this fact immaterial (I-R. 111-112).

4. Another reason for granting certiorari is that the Court below, in its alternate and incidental argument relied on Corn Products Co., 350 U.S. 46 (1950). Although Corn Products Co. might be appropriate if the Court's major premise, that the property in question was "held primarily for sale", were correct, without such a holding the court below would have misconstrued, misapplied or misconceived this court's opinion and extended it beyond its reasonable boundaries. Further, any application of Corn Products Co. to the facts in question would be in direct conflict with the Eighth Circuit in Municipal Bond Corporation, 41 T.C. 20, rev'd 341 F. 2d 683 (C.A. 8, 1965) where the Tax Court relied on Corn Products Co., supra, as its alternate grounds and was reversed by the Eighth Circuit. The application of Corn Products to the instant case would further be in conflict with the Fifth Circuit in Hillard v. Commissioner, 281 F. 2d 279 (C.A. 5, 1960), where on similar facts the majority of the court did not accept such an expansion of the doctrine, although it was the basis of the dissenting opinion.

5. A final reason for granting the writ is the importance of the issues involved in the administration of the revenue. The conflict in the administration of the Internal Revenue Code has involved Section 1221(1) and 1231 and has now been carried to Section 337 by the instant case. As the citator of the Federal Reporter Series shows, Rollingwood v. Commissioner, supra, relied on by the Court below and from which the conflict stems, has been cited in connection with the points here involved in a long list of cases. It has been cited in opinions of the Courts and in dissenting opinions. It has been followed, distinguished, questioned and rejected. This situation is now one of such chaos that uniformity

of decisions can only be obtained by a decision of this Court. The conflict involves an important question of statutory construction, Shapiro v. United States, 335 U.S. 1, 4, and there is a pressing need for a uniform rule on this point. Commissioner v. Bilder, 369 U.S. 499, 501. Moreover, the terms involved are still in the statute and the issue remains as one of importance in the administration of the income tax, not only for earlier years, but for current and future taxable years. The Colony, Inc. v. Commissioner, 357 U.S. 28, 32. This Court has granted certiorari in Malat v. Riddle, 347 F. 2d 23 (C.A. 9, 1965), November 8, 1965, 382 U.S. 900, No. 487 involving the same conflict as it is applied to 26 U.S.C. § 1221.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ARTHUR E. GORE

Counsel for Petitioner.

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APPENDIX A

HOLLYWOOD BASEBALL ASSOCIATION, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 93647. Filed April 21, 1964.

The Brooklyn Dodgers and New York Giants of the major National League transferred their baseball organizations to the Los Angeles and San Francisco areas prior to the commencement of the 1958 professional baseball season. These areas had formerly been controlled by the minor Pacific Coast League. As a result of the transfer, the Pacific Coast League Hollywood Stars baseball organization adopted a plan of liquidation pursuant to section 337, I.R.C. 1954. *Held:*

1. Payments for the nonbulk sale of certain baseball player contracts are not within the purview of section 337;
2. Consideration for the sale of certain property rights flowing from the system of organized professional baseball is within the intendment of section 337; and
3. Organizational expenses determined.

Arthur E. Gore, for the petitioner.

Douglas W. Argue and *Lawrence S. Kartiganer*, for the respondent.

FORRESTER, *Judge:* Respondent has determined deficiencies of $25,502.07, $20,004.38, and $8,760.08 for the taxable years ending October 31, 1955, October 31, 1956, and October 31, 1958,[1] respectively. The three remaining issues before us are as follows:

(1) Whether gain realized from the sale of certain baseball player contracts is within the purview of section 337;

(2) Whether an amount realized pursuant to the transfer of two major league baseball teams to the Pacific coast area is taxable as ordinary income to petitioner; and

(3) Whether the petitioner is entitled to a claimed deduction for organizational expenses.

[1] Respondent, in an amended answer, asserts an additional deficiency of $102,284 for the taxable year ending Oct. 31, 1958, pursuant to sec. 6214(a), I.R.C. 1954. Unless otherwise noted, all Code references are to the I.R.C. of 1954.

Some of the facts have been stipulated and are so found.

Petitioner, Hollywood Baseball Association, was a corporation organized under the laws of the State of California on December 8, 1938. From December 8, 1938, to December 13, 1946, petitioner was known as Hollywood Baseball Investment Co. (hereinafter sometimes called Investment).

Another corporation, Hollywood Baseball Association, a California corporation (not the petitioner herein, and hereinafter sometimes called Association), was organized on December 18, 1937. This corporation was formed for the purpose of acquiring, owning, and operating a professional baseball team in the Pacific Coast Baseball League (hereinafter called P.C.L.). All of the stock of this corporation was owned, from its inception, by Mission Baseball Association, a California corporation.

As of December 1, 1938, Investment purchased all of the stock of Association from Mission Baseball Association for $40,000.

On June 13, 1946, Association filed a certificate of election to dissolve with the secretary of state of California. On December 16, 1946, it filed a certificate of dissolution with the secretary of state of California. Pursuant to the certificate of election to dissolve, all of its assets and liabilities were transferred to petitioner, its sole stockholder, on December 11, 1946. On December 13, 1946, there was filed with the secretary of state of California, a consent of the shareholders of petitioner to change petitioner's name from Hollywood Baseball Investment Co. to Hollywood Baseball Association. On and after December 13, 1946, petitioner was known as Hollywood Baseball Association.

During and prior to the fiscal years here in issue, petitioner operated under the name of the Hollywood Stars as a member club of the P.C.L.

On December 17, 1957, petitioner's stockholders adopted and assented to a plan of complete liquidation.

On its tax return for the fiscal period ended October 31, 1958, petitioner reported the following as items of nontaxable income:

SCHEDULE 1—INCOME NONTAXABLE UNDER SECTION 337 OF THE INTERNAL REVENUE CODE AND SECTION 10,352(E) OF CALIFORNIA REVENUE AND TAXATION CODE

Item	Date of sale	Income
Sale of equipment (fully depr.)	Dec. 18, 1957	$5,000
Sale of field lights (fully depr.)	Feb. 28, 1958	5,000
P.C.L. sale of franchise rights	Jan. 27, 1958	150,000
Sale of player contracts	Mar. 28, 1958	117,000
Sale of franchise	Dec. 18, 1957	100,000
Total nontaxable income		377,000
Less original cost of franchise rights		150,000
Net nontaxable income		227,000

Findings of Fact as to Issue 1. Regarding Whether Amounts Received For the Sale of Certain Baseball Player Contracts Are Within the Purview of Section 337

By documents entitled "Uniform Agreement for the Assignment of a Player's Contract to or by a Major League Club" and dated October 1, 1957, petitioner assigned the contracts of two baseball players to the Pittsburgh Athletic Co., Inc. (hereinafter called Pittsburgh). The following stated conditions were contained in each of the two agreements:

> ***Conditionally:*** For and in consideration of the sum of $70,000.00 (Seventy Thousand Dollars) of which $25,000.00 (Twenty-Five Thousand Dollars) is payable upon execution of this agreement and the balance of $45,000.00 (Forty-Five Thousand Dollars) is payable if player is retained by Pittsburgh on April 1, 1958.

Petitioner received $25,000 for each player contract and included this total sum of $50,000 in its income tax return for the fiscal period ended October 31, 1957. The cost of the two player contracts to petitioner was $4,500, which amount had been previously deducted by petitioner as an item of current expense offsetting current income for Federal income tax reporting purposes. The remaining $90,000, or $45,000 per contract, was reported by petitioner on its Federal income tax return for the period ended October 31, 1958, as nontaxable income under section 337.

By documents entitled "Official Agreement for Outright or Conditional Assignment" and dated January 3, 10, and 11, 1958, petitioner assigned the contracts of six baseball players to the Columbus Baseball Club of the International League. These have been treated as sales to Pittsburgh, which was connected with the stated buyer. The three agreements, each involving two player contracts, involved the assignment of other player contracts to petitioner and also a total of $27,000 as consideration flowing to petitioner. The cost of the six player contracts to petitioner was $17,650, which amount had been previously deducted by petitioner as an item of current expense offsetting current income for Federal income tax reporting purposes. The $27,000 was reported by petitioner on its Federal income tax return for the period ended October 31, 1958, as nontaxable income under section 337.

The world of professional baseball, made up of major and minor professional baseball leagues and their constituent clubs, is governed by a detailed set of agreements, rules, and regulations, most or all of which are codified in an annual publication entitled "The Baseball Blue Book." The parties stipulated relevant portions of the Baseball Blue Book for 1957. These provisions may be summarized in the following manner:

(a) Major league agreement—An agreement between the National and American Leagues of professional baseball (hereinafter sometimes called the major leagues) and their [then] 16 constituent clubs;

(b) Major league rules—A set of rules formulated pursuant to the major league agreement covering the operation of and relations between the National and American major leagues;

(c) Professional baseball agreement—An agreement between the National and American major leagues and the National Association of Professional Baseball Leagues (hereinafter sometimes called the minor leagues);

(d) Major League-National Association rules (hereinafter sometimes called M.L.-N.A. rules)—A set of rules formulated pursuant to the professional baseball agreement covering operations and relations between the major and minor leagues.

(e) National association agreement—An agreement and rules covering the operations of and relations between the various minor leagues and their minor league member clubs.

Under the rules of organized professional baseball, the purchase and sale of player contracts was regulated and controlled by a series of agreements and regulations governing the operations of and relations between the major and minor leagues. As a party to these agreements the P.C.L. was subject to the rules governing a category known as open classification.

The rules of organized professional baseball established a procedure whereby players of minor league teams could be selected by major league teams (hereinafter sometimes called the "player draft"). The consideration required under these rules for the selection of a player from an open classification league was $15,000. The rules provided, *inter alia*, that:

> For the purpose of enabling players to advance in their profession, the contracts of National Association players shall be subject to selection from clubs holding title thereto by Major League clubs and by National Association clubs of higher classification upon the following conditions:
>
> (a) Players whose contracts have been or hereafter are assigned outright to National Association clubs by Major League clubs shall be subject to selection without restrictions other than the following:
>
> (1) One player's contract only may be selected each year from each Open Classification * * * club, except as hereinafter set forth in (4) below.
>
> * * * * * * * *
>
> (4) Any club may designate a player's contract as being subject to unrestricted selection. Selection of any such player's contract shall not preclude selection of the contract of any one other player as set forth in (1) * * * hereof.
>
> (5) Contracts of players who have as Veteran Major League players * * * given written consent to the assignment of their contract to a National Association club, shall be subject to unrestricted selection at any and all selection meetings following such assignment * * *
>
> (b) The contracts of all other players shall be subject to selection of Major League * * * clubs after such players have had the following experience with

a club or clubs of the National Association; service during each of five seasons if reserved by an Open Classification club; * * *

(c) A player shall be considered as having had a "season's service" for the purpose of this rule during any season in which he has been on the active list or otherwise under control of a National Association club or clubs 30 days or more * * *.

(d) Nothing in this rule shall make subject to selection the contract of a player who has waived selection rights under the Professional Baseball Agreement or Rules pursuant to contract with an Open Classification club.

Players on open classification teams had the right to exempt themselves from the player draft. The record does not disclose any player who so acted.

The M.L.–N.A. rules imposed a limit upon the number of players to which major and minor league clubs could hold title. The limitations upon open classification leagues were as follows:

Open Classification * * * clubs shall not have title to more than thirty-eight (38) player contracts at any time, including the contracts of players on the Active List, under reservation, and on optional assignment to other clubs, but excluding the contracts of players on the Voluntarily Retired, Disqualified, Restricted, Ineligible and National Defense Service Lists, which number must be reduced to twenty-four (24) active players by the opening date of the Major League season or of the particular league's own season, whichever is the later; and further reduced to twenty-one (21) active players from the 31st day of the playing season to twenty (20) days before the close of season each year, both inclusive.

The reason for this limitation was stated as follows:

Since the supply of skilled players is not equal to the demand, the Major Leagues shall strictly observe their own rule imposing a limitation upon the number of players on their clubs and the National Association clubs shall likewise be limited * * *.

The Major League-National Association rules provided that a uniform baseball player contract must be used within organized baseball. The relevant rule stated the following:

Uniform Contract. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council: and the contract between all clubs and players in the National Association shall be in a single form which shall be prescribed by the President of the National Association. No club shall make a contract different from the uniform contract, and no club shall make a contract containing a non-reserve clause except permission be first secured from the Commissioner in case of a Major League player, or from the President of the National Association in case of a National Association player. The making of any agreement between a club and a player not embodied in the contract shall subject both parties to discipline; and no such agreement, whether written or verbal, shall be recognized or enforced.

The uniform baseball player contract usually contained a "reserve clause" which reserved to the employing team the right to renew the employment for a succeeding year, subject to salary renegotiation.

Successive agreement to contracts containing reserve clauses would effect continued control over a player during his playing life. The parties stipulated a copy of a document entitled "Uniform Player Contract" and stipulated that it is representative of the player contract form used by the minor leagues. The following is contained in the uniform player contract:

> On or before March 1 * * * of the year next following the playing season covered by this contract, the Club may notify the Player of its intention to renew this contract, by tendering him a contract for the term of such year, except that the compensation rate shall be such as the parties may then agree upon. * * * In the absence of agreement by the parties, the compensation rate shall be determined as provided * * * [below], but pending such determination the Player will accept the compensation rate fixed by the Club or else will not play otherwise than for the Club.
>
> The Club's right to renew this contract * * * and all covenants, promises and representations of the Player have been taken into consideration in determining the amount payable * * *.
>
> In case of dispute between the Player and the Club * * *, the same shall be referred to * * * [arbitration].

Major and minor league teams sometimes entered into an arrangement called a "working agreement." The M.L.–N.A. rules defined working agreement as follows:

> A club may convey by written agreement to a club of higher classification the right to select the contract, or contracts, of one or more players for a specified consideration which in no event shall be less than $100.00 per contract selected. Such agreements shall be known as "working agreements" and shall be subject to approval by the Commissioner if between a Major League Club and a National Association club and by the President of the National Association if between National Association clubs.
>
> * * * * * * *
>
> Any selection made under working agreements granting the right to make selections of players' contracts must be made on or before October 1st of each year, * * *.
>
> * * * * * * *
>
> Working Agreements which contemplate the selection of player contracts from clubs of Class A or higher, * * * may be entered into upon terms and conditions satisfactory to the clubs concerned, provided that no provision of such agreement shall conflict with * * * [the above].

For the years ended 1949 and 1950, petitioner had a working agreement with the Brooklyn National League Baseball Club, Inc., for which it received $20,000 per year. For the years ended 1951 and 1952, petitioner had a working agreement with Pittsburgh of the national league, for which it received $27,500 per year. For the years ended 1955, 1956, and 1957, petitioner had a working agreement with Pittsburgh for which it received $20,000 per year.

The working agreement dated April 1, 1957, gave Pittsburgh the right to select, under certain conditions, the contracts of any and all players belonging to petitioner. It provided, *inter alia*, the following:

WORKING AGREEMENT

I

For and in consideration of the payment of the sum of $20,000.00 (Twenty Thousand Dollars) by Pittsburgh to Hollywood, Hollywood gives to Pittsburgh the right to select, subject to conditions set forth below, the contracts of any and all players (including the manager, if a player) now under contract or reservation to Hollywood or whose contracts may become the property of Hollywood during the term of this agreement and also the contracts of all players which now are or may become the property of Hollywood-affiliated clubs during the term of this agreement and thereby become selectable or otherwise subject to acquisition by Hollywood, and the consideration for this agreement is at the same time consideration for contracts selected under its provisions except as otherwise specified herein.

* * * * * * *

(a) In the event of the termination of this agreement, Hollywood will retain title to the contracts of eight (8) players mutually agreeable to both parties or in lieu thereof the sum of ($15,000.00) Fifteen Thousand Dollars shall be paid to Hollywood by Pittsburgh.

(b) As to selections made by Pittsburgh under this agreement, Pittsburgh shall reimburse Hollywood at the time of selection for payments made by Hollywood in originally acquiring the selected players' contracts as free agents (bonuses) or by purchase or selection (draft) from clubs not affiliated with Pittsburgh independent of recommendation by authorized representative of Pittsburgh or other Pittsburgh-affiliated clubs.

(c) If during the term of this agreement authorized representatives of Pittsburgh or other Pittsburgh-affiliated clubs on behalf of Hollywood shall negotiate contracts with free agents providing for the payment of bonuses to such players, it is understood and agreed that Pittsburgh shall promptly reimburse Hollywood for such bonus payments provided that such payments, when payable on a contingent basis, have first been approved by Pittsburgh.

(d) Hollywood during the term of this agreement may not unconditionally release any player or assign outright the contract of any player without first giving Pittsburgh ten (10) days' written or telegraphic notice of its intention to release or assign such player's contract, within which ten (10) day period Pittsburgh may elect to exercise its right to select such contract or waive all right thereto.

II

The right of selection provided for in "I" above is to be exercisable by Pittsburgh on or before October 1, 1957, except as otherwise provided herein, and Hollywood upon receipt of notice of selection immediately shall assign outright to Pittsburgh the contracts of selected players. All players, whose contracts are selected under this agreement, however, shall remain with Hollywood until the close of its current season,—including all official post-season games, if any, unless otherwise agreed upon.

III

If during the term of this agreement Hollywood with Pittsburgh's approval shall enter into working agreements with clubs of lower classification, Pittsburgh shall reimburse Hollywood for all expenses incurred by Hollywood under such agreements.

IV

The selection of Hollywood's field manager shall be subject to approval by Pittsburgh (but Hollywood solely shall be responsible for payment of said manager's salary).

V

Hollywood shall train at a site of its own choosing and shall be responsible for all expenses incurred in connection therewith.

VI

This agreement for the 1957 season shall be extended automatically for 1958 on the same conditions and terms as are set forth herein unless notice is given by either party of a desire to terminate this agreement as of October 1, 1957. Notice of such desire to terminate on the part of Hollywood shall be given to Pittsburgh on or before August 1, 1957. Should Pittsburgh desire to terminate the agreement it must notify Hollywood to that effect on or before September 1, 1957.

VII

Pittsburgh agrees not to hold Hollywood liable for damages for failure to operate a baseball team at any time during the life of this agreement.

Although under the stated terms of the working agreement petitioner was only entitled to reimbursement for various costs of acquiring a player's contract, the general practice was that petitioner would be paid the fair market value for the sale of player contracts.[3] During at least 1957, the chairman of the board of directors of Pittsburgh and the chairman of petitioner's board of directors was the same man, Branch Rickey, and Pittsburgh owned approximately 25 percent of petitioner's voting stock. The Baseball Blue Book listed petitioner as "Connected with Pittsburgh."

Petitioner sold a total of 224 player contracts for a total consideration of approximately $799,800 from the year ended 1948 through the

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[3] Robert H. Cobb (hereinafter sometimes called Cobb), former president of petitioner, explained the fact that petitioner received the fair market value for its players under the working agreement as follows:

"Q. Isn't it a fact that only due to the fact that Pittsburgh benevolently or otherwise helped you to survive in effect by purchasing players' contracts from you at high prices, so that you could offset [the] * * * tremendous loss [in 1956 and 1957]?

"A. That may be possible, but they realized and appreciated the cost of developing these players. * * * [I]t takes public relations, but if you happen to work with a club like the Dodgers, for instance, or like Pittsburgh where we had a very close association, they recognized your problem and they wouldn't hold you right to their working agreement."

Similarly, Paul Jeschke, former corporate secretary and business manager of petitioner testified as follows:

"Q. How were you able to obtain sales prices in excess of cost in your negotiations with Pittsburgh?

"A. Well, the working agreement is for a period of one year, and often, in order to assure a renewal in the working agreement, a fair market price of a player would have to be paid rather than the cost. You develop a reputation of being fair with someone, and if you paid the fair price for the ballplayer, your reputation was better, and you were able to get better working agreements."

year ended 1957. During this same period the petitioner purchased a total of 175 player contracts at a total cost of $561,450.

The following schedule reflects, in round figures, for the year ended 1948 through the year ended 1957, the receipts from the sale of player contracts, the number of sales and purchases, and certain expenses, such as the purchase price of player contracts, payments to free agents which were not reimbursed by major league teams holding working agreements with petitioner, net cost of player contract options and National Association commissions: [3]

Fiscal year ending	Revenue from contract sales	Number of sales	Number of purchases	Expenses
1948	$84,500	19	17	$114,900
1949	42,800	26	22	75,400
1950	98,500	18	17	64,600
1951	32,300	21	11	60,800
1952	40,850	14	15	103,800
1953	75,700	13	12	62,700
1954	123,000	35	31	98,900
1955	100,350	23	24	86,100
1956	125,600	38	21	33,400
1957	76,200	17	5	18,500
Total	799,800	224	175	698,100

Petitioner derived receipts from the sale of admissions to baseball games, concession items, advertising, radio and television broadcasting rights, as well as from the sale of baseball player contracts. The following schedule reflects (round figures) for the year ended 1948 through the year ended 1957, the revenues realized from the operations of the petitioner, exclusive of the receipts from player contracts, and the operation's expenses, exclusive of the purchase price of player contracts, net payments to free agents, net cost of player contract options, and National Association commissions:

Fiscal year ending	Revenues	Expenses	Fiscal year ending	Revenues	Expenses
1948	$522,700	$470,200	1954	$528,400	$483,100
1949	670,600	507,400	1955	496,800	441,000
1950	588,100	515,400	1956	397,900	452,900
1951	491,000	482,200	1957	361,600	442,400
1952	498,700	507,800			
1953	485,400	459,100	Totals	5,044,200	4,761,500

[3] Petitioner acquired players through purchase from other teams, the addition of "free agents," who were sometimes paid compensation (termed by petitioner "player bonuses") which compensation was sometimes reimbursed by major league teams holding working agreements with petitioner, minor league working agreements [1954 and 1955 only], and player contract options. A National Association commission is a fee paid to the National Association for the assignment of contracts.

Cobb testified as follows regarding expenses other than the cost of acquiring player contracts:

"Q. Of course, all of these expenses * * * are part of your overall baseball operations.

"A. Yes, sir, in the final result, in the final analysis, yes."

From at least the year ended 1948 through the year ended October 31, 1957, it had been the consistent accounting procedure of petitioner to return for Federal income tax reporting purposes the revenue realized from player contract sales as either a part of its gross receipts or as other income from business operations. During these years it was petitioner's consistent accounting practice to deduct as an annual expense for Federal income tax purposes the entire cost of player contracts purchased in each year.

The player contracts at issue were held primarily for sale to customers in the ordinary course of petitioner's business.

* * * * * * * * * * * *

OPINION

Issue 1. Regarding Whether Amounts Received for the Sale of Certain Baseball Player Contracts Are Within the Purview of Section 337

The first issue is whether gain realized by petitioner from the sale of certain baseball player contracts to Pittsburgh is within the nonrecog-

nition provisions of section 337.[4] Respondent contests the application of section 337 on two grounds: He asserts that the player contracts are excluded from section 337 by the terms of section 337(b)(1)(A) and he avers that some of the relevant contracts were sold prior to the adoption of the plan of liquidation. Since we find for the respondent on the first ground we need not consider the latter theory.

Section 337 is a relief provision which is designed to eliminate the difference in corporate tax consequence which formerly depended upon whether a corporation or its shareholder sold a liquidating corporation's assets. S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 258–260 (1954); H. Rept. No. 1337, 83d Cong., 2d Sess., pp. A106–A109 (1954). Cf. *Commisioner* v. *Court Holding Co.*, 324 U.S. 331; *United States* v. *Cumberland Pub. Serv. Co.*, 338 U.S. 451. Gain realized is therefore not recognized at the corporate level if the sale complies with the provisions of section 337.

The limited purpose of providing parity of treatment for unusual sales in liquidation would not be served by granting nonrecognition for gain which is derived from ordinary sales in the ordinary course of a corporation's business. Hence, unless "inventory-type" assets are sold in bulk, gain from property held for sale to customers in the ordinary course of a corporation's business is excluded from the nonrecognition relief. This is accomplished by granting nonrecognition to corporate "property" in section 337(a) and then stating in section 337(b)(1)(A) that:

> the term "property" does not include—
>
> (A) stock in trade of the corporation, or other property, of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business,

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[4] SEC. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) GENERAL RULE.—If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

(b) PROPERTY DEFINED.—

(1) IN GENERAL.—For purposes of subsection (a), the term "property" does not include—

(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business, * * *.

* * * * * * * *

(2) NONRECOGNITION WITH RESPECT TO INVENTORY IN CERTAIN CASES.—Notwithstanding paragraph (1) of this subsection, if substantially all of the property described in subparagraph (A) of such paragraph (1) which is attributable to a trade or business of the corporation is, in accordance with this section, sold or exchanged to one person in one transaction, then for purposes of subsection (a) the term "property" includes—

(A) such property so sold or exchanged, * * *.

This exclusion of "inventory-type" assets has its counterpart in section 1221(1)[5] which creates an exclusion from capital gains treatment by the use of words which are essentially identical to those contained in section 337(b)(1)(A). The only differences are the section 337 utilization of the specific "corporation" rather than the generic "taxpayer" and the use of the conjunction "and" rather than "or." Since section 337 is by its terms limited to corporations, the difference between "corporation" and "taxpayer" is of no significance; nor is the use of the conjunction "and" for "or." The essential identity of terms is matched by the similarity of purpose. Section 1221(1) excludes certain matter from a relief provision because Congress intended that profits and losses resulting from the sale of "inventory-type" assets should not be granted capital gains treatment. *Rollingswood Corp.* v. *Commissioner*, 190 F. 2d 263 (C.A. 9), affirming a Memorandum Opinion of this Court. Cf. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46. Similarly, section 337(b)(1)(A) excludes essentially identically articulated matter from a relief provision because Congress intended that income from the sale of "inventory-type" assets should not be granted nonrecognition from corporate-level taxation. "It is intended that, during the 12-month period, sales in the ordinary course of business shall result in ordinary gain to the corporation as if the corporation were not in the process of liquidating." S. Rept. No. 1622, 83d Cong., 2d Sess., p. 259 (1954). See also H. Rept. No. 1337, 83d Cong., 2d Sess., pp. A106–A109 (1954). Judicially developed concepts and interpretation regarding section 1221(1) are clearly applicable in analysis of section 337(b)(1)(A). *Jeanese, Inc.* v. *United States*, 227 F. Supp. 304 (N.D. Cal.).

Whether the gain realized from the sale of the relevant baseball player contracts to Pittsburgh pursuant to the working agreement is excluded from section 337 nonrecognition relief by section 337(b)(1)(A) depends upon whether petitioner has sustained its burden of proving that the contracts were not held primarily for sale to customers in the ordinary course of petitioner's business. The purpose for which petitioner held the property is a question of fact which must be determined from the entire record. See *Carlson* v. *Commissioner*, 288 F. 2d 228 (C.A. 7), affirming a Memorandum Opinion of this Court; *Bauschard* v. *Commissioner*, 279 F. 2d 115 (C.A. 6), affirming 31 T.C. 910; *McMillan Mortgage Co.*, 36 T.C. 924; *D. L. Phillips*, 24 T.C. 435; *S.E.C. Corporation* v. *United States*, 140 F. Supp.

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[5] SEC. 1221. CAPITAL ASSET DEFINED

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

717 (S.D.N.Y.), affirmed per curiam 241 F. 2d 416 (C.A. 2), certiorari denied 354 U.S. 909.

There are numerous cases which reach factual conclusions in this area, and they mention several criteria as being relevant, including the purpose for which the property was acquired, held and sold, the intent of the seller, and the volume, frequency, continuity, profitability, and substantiality of sales. Unlike many of the other situations, petitioner's purchase and sale of baseball player contracts was essential to its amusement business as well as being a source of profit in its own right, and the factual criteria must be considered in both lights. The ultimate question is whether one of the primary purposes for which petitioner held the relevant property was sale to customers in the ordinary course of business, and no single analytic criterion is necessarily determinative. *Meridian Inc.* v. *Commissioner*, 322 F. 2d 198 (C.A. 6), affirming a Memorandum Opinion of this Court; *Greene-Haldeman* v. *Commissioner*, 282 F. 2d 884 (C.A. 9), affirming 31 T.C. 1286; *Paul K. Ashby*, 37 T.C. 92; *Solly K. Frankenstein*, 31 T.C. 431, affd. 272 F. 2d 135 (C.A. 7), certiorari denied 362 U.S. 918; *S.E.C. Corporation* v. *United States*, *supra*.

Petitioner views our task differently and avers that we must find the major purpose for which the baseball contracts were held. It asks us to determine whether the purpose was to hold baseball player contracts for amusement income or for sale. But we need not choose between purposes since the statute denies nonrecognition to property "primarily" held for sale and it is well established that "primarily" does not necessarily mean "principal" or "chief." The requisite purpose is present if there is an essential or substantial holding for sale. Property may be held for more than one purpose and if one of the dual purposes is sale to customers in the ordinary course of business, the gain thereby derived may fail to qualify for nonrecognition relief. See *Recordak Corporation* v. *United States*, 325 F. 2d 460 (Ct. Cl.); *American Can Co.* v. *Commissioner*, 317 F. 2d 604 (C.A. 2), affirming on this point 37 T.C. 198, certiorari denied 375 U.S. 993; *Greene-Haldeman* v. *Commissioner*, *supra*; *Bauschard* v. *Commissioner*, *supra*; *Rollingwood* v. *Commissioner*, *supra*; *Municipal Bond Corporation*, 41 T.C. 20; *R. E. Moorhead & Son, Inc.*, 40 T.C. 704; *Estate of Peter Finder*, 37 T.C. 411; *Real Estate Corporation*, 35 T.C. 610, affd. 301 F. 2d 423 (C.A. 10), certiorari denied 371 U.S. 822; *Joseph A. Harrah*, 30 T.C. 1236; *S.E.C. Corporation* v. *United States*, *supra*. Congress did not intend to grant nonrecognition to sales in the ordinary course of business. S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 258, 259 (1954).

It is clear, then, that our task is to determine whether at least one of the essential or substantial purposes in holding baseball player contracts was sale to customers in the ordinary course of business. This

determination must be made on the basis of the record before us and with due regard to the petitioner's burden of proof. Petitioner's representatives often stated that they would have preferred to keep players so as to build a winning team. This is not necessarily inconsistent with a dual purpose to sell. In any event, the acme here is not a purpose which petitioner would have had in an unfettered situation; rather it is the purpose it actually had, and this must be found with due regard to the rules, regulations, and practices of organized professional baseball and the working agreements with major league teams that petitioner voluntarily entered into.

As set out in our findings, the rules of organized baseball required that petitioner hold open its player contracts for sale under certain procedures. Major league clubs could purchase any player contract which petitioner had held for 5 seasons (a season's service being defined as 30 days or more in any given year); one player could be drafted each year without restriction as to time of service if the contract had been assigned outright by a major league club; and petitioner could designate any player contract as being subject to unrestricted selection. Although petitioner's players had the right to exempt themselves from the draft, it is significant that the record does not disclose any attempt by petitioner to encourage such action or any player who took such action.

Further, the rules of organized baseball limited petitioner in the number of player contracts to which it could hold title. It could never hold title to more than 38, which number was reduced to 24 by the opening of the season, and which number was further reduced to 21 for the major portion of the season. Petitioner sold on the average of 22 player contracts in each of the years 1948 through 1957, although it could only retain 21 for the major portion of the season, and it similarly purchased on the average of 18 players per year during the same period with players also being acquired otherwise than by purchase.

Most significantly, the petitioner had entered into "working agreements" with major league clubs. During 1955, 1956, and 1957, it was a party to a working agreement with Pittsburgh. The 1957 agreement, for example, gave Pittsburgh:

> the right to select * * * the contracts of any and all players (including the manager, if a player) now under contract or reservation to * * * [petitioner] or whose contracts may become the property of * * * [petitioner] during the term of this agreement and also the contracts of all players which now are or may become the property of * * * [petitioner] affiliated clubs during the term of this agreement and thereby become selectable or otherwise subject to acquisition by * * * [petitioner] * * *.

Hence the working agreements provided petitioner with a ready outlet and customer for the sale of its player contracts. Rather than

restrict the sale of its player contracts to the extent allowable under the rules of organized baseball, it contracted for consideration to sell any and all contracts Pittsburgh might desire. It received the fair market value for those that it sold to Pittsburgh, in addition to the $20,000 or more it received per year for the entering into the working agreement. The close connection between supplier and customer is emphasized by the fact that the chairman of the board of directors of petitioner was also the chairman of the board of directors of Pittsburgh. The record is inadequate regarding other reasons for entering into working agreements. Even if we assume that there were some reasons other than selling player contracts, the clear implication of the arrangement was that a primary purpose in holding the contracts was the sale to customers in the ordinary course of business.

Moreover, there was great volume, frequency, continuity, and substantiality of sales. From 1948 through 1957, petitioner sold 224 player contracts for a total consideration of approximately $800,000. In the fiscal period ended October 31, 1958, petitioner sold an additional eight contracts to Pittsburgh. Other than for 1958, the lowest number of sales per fiscal year was 13, the highest 38, and the average approximately 22.

Further, the petitioner derived a substantial profit from the sale of baseball player contracts. While there is no certain way of allocating expenses to income from the sale of contracts, since petitioner's overall operation was rather integrated, it is clear that a comparison of income to estimated allocable expenses shows a substantial profit. The approximately $100,000 of profit derived from the sale of player contracts during 1948 through 1957 compares quite favorably to the approximately $280,000 in all other profits during the same period. This is especially so when it is noted that the expenses for all other items was approximately seven times that of the estimated expenses for player contracts. Further, $155,000 was received for working agreements, an item intimately related to the sale of contracts. Too, petitioner derived $117,000 from such sales in the fiscal period ended October 1958. Note also that in the last 2 full years, 1956 and 1957, petitioner lost approximately $55,000 and $80,000, respectively, on its operations exclusive of baseball player contract sales. In these same years, petitioner gained approximately $90,000 and $60,000, respectively, from the sale of such contracts. Finally, the petitioner profited from sales of contracts in each of the last 5 years prior to 1958, that is, from 1953 through 1957. In these most relevant years to our determination, petitioner derived over $220,000 in profit from such sales.

It is evident from this record that petitioner is in error when it contends that the baseball player contracts were not essentially and substantially held for sale to customers in the ordinary course of business. We find that "the taxpayer had as one of its primary purposes

the ultimate sale" of the baseball player contracts "to its customers in the ordinary course of its business at the time it acquired the property, and that this intention continued, unaltered, while" the baseball players exhibited for petitioner "until customers purchased them." *Greene-Haldeman* v. *Commissioner*, *supra* at 887.

The legislative purpose of section 337 is a valid consideration regarding the instant issue, and the finding herein is consistent with that legislative purpose. "Equally material to a proper consideration of the question is a recognition of the fundamental objective of the * * * [statute]." *Paul K. Ashby*, *supra* at 97.

The statutory purpose of section 337 is to relieve and eliminate the formalistic difference reflected in *Commissioner* v. *Court Holding Co.*, *supra*, and *United States* v. *Cumberland Pub. Serv. Co.*, *supra*. This was accomplished by creating a parity of tax consequence which rendered immaterial the fact that a corporation sells assets in liquidation, or its shareholders sell assets after liquidation distribution. S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 258–260 (1954). There is absolutely no support in the legislative history or purpose for the proposition that section 337 is intended to provide nonrecognition for what would otherwise be ordinary corporate income derived from normal and usual nonbulk sales of corporate property.

It must be remembered that the petitioner continually reported the receipts from the sale of baseball player contracts as ordinary income and deducted in a single year the costs of such contracts. This practice of the income aspect was consistent with the contracts being held for sale in the ordinary course of business.[6] If nonrecognition were granted to such income, section 337 would be affording tax-free treat-

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[6] This discussion need not be extended further due to our finding that the contracts here were held for sale in the ordinary course of business. We note without comment, however, that the Internal Revenue Service would apply a tax benefit theory to conclude that previously deducted amounts constitute ordinary income on the sale in liquidation of the allocable assets and would thereby deny section 337 nonrecognition. See Rev. Rul. 61–214, 1961–2 C.B. 60. Cf. sec. 1245, adopted Revenue Act of 1962; *Commissioner* v. *South Lake Farms, Inc.*, 324 F. 2d 837 (C.A. 9), affirming 36 T.C. 1027; *Family Record Plan, Inc.* v. *Commissioner*, 309 F. 2d 208 (C.A. 9), affirming 36 T.C. 805, certiorari denied 373 U.S. 910; *Commissioner* v. *Kuckenberg*, 309 F. 2d 202 (C.A. 9), reversing 35 T.C. 473, certiorari denied 373 U.S. 909; *Williamson* v. *United States*, 292 F. 2d 524 (Ct. Cl.); *Floyd* v. *Scofield*, 193 F. 2d 594 (C.A. 5); *Central Building & Loan Association*, 34 T.C. 447; Rev. Rul. 59–308, 1959–2 C.B. 110. Cf. also *West Seattle National Bank of Seattle* v. *Commissioner*, 288 F. 2d. 47 (C.A. 9), affirming 33 T.C. 841.

There may be some question regarding petitioner's practice of deducting in a single year the costs of the baseball player contracts, since the relevant contracts may have had a more than 1-year useful life. See and compare *Helvering* v. *Kansas City American Ass'n Baseball Co.*, 75 F. 2d 600 (C.A. 8), affirming a Memorandum Opinion of the Court; *Commissioner* v. *Chicago National League Ball Club*, 74 F. 2d 1010 (C.A. 7), affirming a Memorandum Opinion of the Court; *Commissioner* v. *Pittsburg Athletic Co.*, 72 F. 2d 883 (C.A. 3), affirming 27 B.T.A. 1074; I.T. 4078, 1952–1 C.B. 39; with *Indiana Broadcasting Corporation*, 41 T.C. 793; and *Westinghouse Broadcasting Co.*, 36 T.C. 912, affd. 309 F. 2d 279 (C.A. 3), certiorari denied 372 U.S. 935, and the cases therein cited at pp. 919–921; Rev. Rul. 54–441, 1954–2 C.B. 101. Note also that a question regarding whether salvage value equals or exceeds costs may arise. See *Massey Motors* v. *United States*, 364 U.S. 92; *R. E. Moorhead & Son, Inc.*, 40 T.C. 704, 712–713. We need not here meet the deduction question as it is not in issue.

ment from corporate income tax based on the insignificant fact that such income was derived within a 12-month period following adoption of a plan of liquidation. Rather than providing a parity of tax consequence in a *Court Holding Co—Cumberland Pub. Serv. Co.* situation, section 337 would be authorizing a pass-through of corporate ordinary income without corporate taxation. The relevant transactions were ordinary income sales to Pittsburgh pursuant to a working agreement, not extraordinary sales in liquidation. The purpose of section 337 would be offended by allowing nonrecognition in the instant case.[7]

Further, the reasoning of the Supreme Court in *Corn Products Co.* v. *Commissioner*, *supra*, is relevant. The Court held that hedging transactions were not to be afforded capital gains treatment because they constituted an integral part of the taxpayer's regular business. The inherent connection with regular business was determinative, since the Court reasoned that Congress did not intend that profits and losses from everyday business operations should be within the purview of the relief capital gains provisions. See also *Booth Newspapers, Inc.* v. *United States*, 303 F. 2d 916 (Ct. Cl.); *Hallcraft Homes, Inc.*, 40 T.C. 199; *McMillan Mortgage Co.*, *supra*, and the cases therein cited; *Mansfield Journal Co.*, 31 T.C. 902, affd. 274 F. 2d 284 (C.A. 6); *America-Southeast Asia Co.*, 26 T.C. 198. This reasoning is applicable to the instant case, since the profitable sale of baseball player contracts was clearly an integral, inherent, and substantial part of the petitioner's business. We do not believe that Congress intended that profits arising from the everyday sale of such property should be within the purview of the relief nonrecognition section 337. Indeed, the instant case is clearer than *Corn Products Co.*; since we have here found that the relevant property was primarily held for sale to customers in the ordinary course of business within the terms of section 337(b)(1)(A). In *Corn Products Co.*, the Court stated that the property did not come within the corresponding predecessor of section 1221(1) and deemed sufficient in and of itself the inherent connection with the taxpayer's business.

We find for the respondent on this issue.

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[7] "It is intended that, during the 12-month period, sales in the ordinary course of business shall result in ordinary gain to the corporation as if the corporation were not in the process of liquidating. * * * [S. Rept. No. 1622, 83d Cong., 2d Sess., p. 259]

"[The House version of sec. 337 is made] specifically inapplicable to a sale made in the ordinary course of the business of the corporation although such sale occurs after adoption of the plan of partial or complete liquidation. For example, if a corporation engaged in owning and operating filling stations were to liquidate * * *, the continued sale of gasoline to motorists during the course of winding up its business would still be considered to give rise to income taxable at the corporate level. [H. Rept. No. 1337, 83d Cong., 2d Sess., p. A107]"

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. HOLLYWOOD BASEBALL ASSOCIATION, *Respondent.*	No. 19,718
HOLLYWOOD BASEBALL ASSOCIATION, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	

[November 1, 1965]

On Petition For Review of the Decision of the Tax Court of the United States

Before: BARNES, BROWNING and DUNIWAY, Circuit Judges

BARNES, Circuit Judge:

This is a petition by the Commissioner of Internal Revenue for review of a decision of the Tax Court reversing the Commissioner's finding of a deficiency in taxpayer's returns on one ground; and a cross-petition by taxpayer for review of a decision by the Tax Court sustaining the Commissioner's finding of a deficiency in taxpayer's returns on a second ground.

Jurisdiction of the Tax Court was based upon Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 6213(a)), which permits a taxpayer who has received a deficiency notice pursuant to 26 U.S.C. § 6212 to petition the Tax Court for a redetermination of the deficiency within ninety days. This court

has jurisdiction of the petition and cross-petition to review pursuant to Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C. § 7482).

The basic facts are not in dispute, though somewhat complicated. We refer to the Tax Court opinion for a detailed explanation of them. 42 T.C. 234 (1964).

The Commissioner states the nature of the controversy in his petition for review as follows:

> "The taxpayer was a member of the Pacific Coast League which was a professional baseball minor league recognized by the established professional baseball organization. In 1957 two major league teams moved into the territory of the Pacific Coast League and made a payment to the League, as they were required to do under the rules of professional baseball. At the time the taxpayer received its portion of the payment it was in the process of liquidation.
>
> The Tax Court held that the taxpayer had properly not recognized any gain from its portion of the payment, because the payment represented proceeds from the 'sale of property' and the gain was therefore not to be recognized pursuant to section 337 of the 1954 Internal Revenue Code.
>
> The Commissioner contends in this appeal that the evidence clearly shows that the payment was merely in lieu of future profits and therefore did not result from a sale of anything, and in the alternative even if there had been a sale, it was not a sale of property as that term is used in section 337 of the 1954 Internal Revenue Code." (Clk's Tr. 141-42.)

The taxpayer filed his cross-petition to review a portion of the decision, and states the controversy as follows:

> "On its tax return for the fiscal period ended October 31, 1958, the taxpayer reported the sale of player contracts for the sum of $117,000.00 as non-taxable income under Section 337 of the Internal Revenue Code.
>
> The Tax Court held that the player contracts concerned were held primarily for sale to customers in the ordinary course of the taxpayer's business and excluded from the non-recognition of gain provided by Section 337 by the terms of Section 337(b)(1)(A).

> The taxpayer contends in this appeal that the portion of the decision appealed from herein, is not supported by the evidence and is contrary to law, and that the evidence clearly shows that the player contracts in question were not held primarily for sale to customers in the ordinary course of the taxpayer's business, but on the contrary were developed at great expense primarily for the purpose of playing baseball and developing a major league team and, when sold, were generally sold at a loss when all of the expense of acquisition and development of players sold is considered as set forth in the evidence. . . ." (Clk's Tr. 144.)

We are satisfied the Tax Court has correctly decided both matters. We therefore refer to and adopt that portion of the Tax Court's opinion which determined "Issue II" (Tr. pp. 120-32, inclusive; Issue 2 in opinion, 42 T.C. at 264-70, inclusive) and that which was held controlling as to "Issue I" (Tr. pp. 105-20, inclusive; Issue 1 in opinion, 42 T.C. at 256-63, inclusive).

We affirm the decision of the Tax Court under review, both on the issue raised by the petition and those raised by the cross-petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 957

HOLLYWOOD BASEBALL ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner, Hollywood Baseball Association, owned and operated a minor league baseball team as a member of the Pacific Coast League. During the taxable year ending October 31, 1958, and many prior taxable years, petitioner received substantial revenue from (1) the playing of baseball games and (2) the sale of baseball player contracts. Prior to the taxable year here in question, petitioner had consistently reported the proceeds from sales of baseball player contracts as ordinary income. Petitioner was liquidated during 1958 and claimed that $117,000 derived from the sale of eight player contracts was not subject to federal income tax under the provisions of § 337 of the Internal Revenue Code of 1954. (Pet. 18.)

208-522—66

Section 337(a) provides for the nonrecognition of gain or loss from the sale or exchange of property by a corporation during the twelve-month period between adoption and execution of a plan of complete liquidation. Section 337(b)(1)(A) specifically excludes from the nonrecognition provisions of § 337(a) gains or losses from sales of "property held by the corporation primarily for sale to customers in the ordinary course of its trade or business." This exclusion from nonrecognition of gain is virtually identical to the exclusion from capital gain treatment contained in § 1221(1) of the Code.[1]

The Tax Court recognized the relationship between § 337(b)(1)(A) and § 1221(1), and also recognized that the purpose for which petitioner held the player contracts was a factual question (Pet. 28). It carefully examined the many rules and agreements governing organized baseball and concluded that one of the important roles of minor league teams in the overall structure of organized baseball was the development of baseball players and the ultimate sale of their contracts (Pet. 30–31). Specifically, with regard to this taxpayer, the Tax Court found that during the ten years prior to 1958 over $800,000 of revenue was derived from the sale of 224 player contracts. The Tax Court also found that these sales had yielded approximately $100,000 of income during the period

[1] Section 1221 provides:

> For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—
>
> (1) * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; * * *

here in question, which, when compared to the $280,000 of other income earned during this period, demonstrated that the sales of player contracts had been one of the significant sources of petitioner's income from the operation of its business (Pet. 31). Accordingly, on the basis of this and other evidence, the Tax Court held that the sale of player contracts was a vital part of petitioner's everyday business and that the proceeds of such sales were neither entitled to preferential capital gain treatment in nonliquidation years nor nonrecognition treatment in the year of liquidation (Pet. 31–33).

The Court of Appeals for the Ninth Circuit agreed with the Tax Court that if one of the substantial or essential purposes for holding property is for sale in the ordinary course of a taxpayer's business, such property is held primarily for sale to customers in the ordinary course of business within the meaning of § 337(b)(1)(A) and § 1221(1). In so holding, the Court recognized that the question is largely a factual one and that the Tax Court decision was amply supported by the evidence. (Pet. 35–36.)

Petitioner argues that both courts erred in their determination because they applied incorrect legal criteria. It contends that as used in the relevant statutory provision the term "primarily" means "chief" or "principal." Thus, in petitioner's view the fact (found by both courts) that it was in the business of selling player contracts and that one of the essential or substantial purposes for holding the contracts in question was for sale to customers in the ordinary course of that business is irrelevant (Pet. 11).

As petitioner points out (Pet. 11, 15), the question presented by its petition for certiorari is essentially the same as that awaiting argument before this Court in *Malat* v. *Riddell,* No. 487, this term, certiorari granted November 8, 1965 (382 U.S. 900)—namely, the meaning of the phrase "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," appearing in § 1221 (1) of the 1954 Code and carried over into § 337(b) (1)(A). The decision below is in accord with that of the Ninth Circuit in *Malat* (347 F. 2d 23), and, we submit, is correct for the reasons set forth in our brief in the *Malat* case. Although we believe further review by this Court is neither necessary nor appropriate, the Court may wish to defer action on the petition pending its disposition of *Malat.*[3]

Respectfully submitted.

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Solicitor General.
RICHARD M. ROBERTS,
Acting Assistant Attorney General.
HARRY BAUM,
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Attorneys.

FEBRUARY 1966.

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[3] In view of its conclusion that the property in question was held "primarily for sale" in the ordinary course of petitioner's business, both the Tax Court and the court of appeals deemed it unnecessary to pass on alternative grounds for sustaining the Commissioner's deficiency determination on this issue (Pet. 27, 32–33, 36). Accordingly, even if the petition were granted and the decision below reversed, a remand for consideration of the Commissioner's alternative contentions would be appropriate.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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